United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1860

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 74-1860, 75-1253

UNITED STATES OF AMERICA,

Appellee,

—v.—

GEORGE STOFSKY, CHARLES HOFF, AL GOLD and CLIFFORD LAGEOLES,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF ON BEHALF OF APPELLANTS GEORGE STOFSKY and AL GOLD

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Introduction

This Brief is submitted on behalf of defendants Stofsky and Gold in reply to the Brief filed on behalf of the government on September 9, 1975, and should be read along with the Reply Brief being submitted on behalf of defendants Hoff and Lageoles to the extent that the arguments contained therein apply to all four defendants.

No attempt will be made in this Brief to pinpoint the many factual errors which we believe are contained in the government's Statement of Facts. As we noted in the Main Brief (p. 5), we felt that because of the unusual nature of this case, a more complete Statement of Facts was required and we attempted to present as balanced a Statement as possible in order to assist this Court in determining the somewhat complicated substantive issues

raised in this appeal. While we fully understand the government's right at this juncture to take for itself all reasonable inferences in its favor, we sincerely believe that extraordinary liberties with the facts were taken and ask this Court to satisfy itself by its own analysis of the Record. Suffice it to say, we continue to rely in total on the Statement of Facts as set forth in our Main Brief (pp. 4-36).

Since we believe we anticipated the responses of the government to all of our arguments and do not wish to burden this Court with extensive reargument concerning matters that have been fully covered in earlier briefs, we will restrict this Brief to only those points which, in our judgment, demand reply. In so doing, defendants Stofsky and Gold do not, of course, intend to abandon or waive any arguments which are already before this Court in this appeal.

ARGUMENT

POINT I

Defendants' Motion For A New Trial Based Upon Evidence Of Admitted Perjury By The Government's Principal Witness Should Have Been Granted, and Their Convictions Should Therefore Be Reversed.

In what clearly appears to be a desperate attempt to escape the consequences of the admittedly perjurious testimony of its principal witness, Jack Glasser, and in an effort to evade its own responsibilities regarding the conduct of this prosecution, the government, in its Brief, argues at great length (Gov. Br. pp. 46-51; 63-68) that defendants' requests here for a new trial should be rejected solely because of the alleged failure of defense counsel to exercise "due diligence" with respect to the new evidence which was discovered subsequent to the trial. However appealing and simplifying such an argument may be for the government to make to extricate itself from the thicket of perjury now conceded to have per-

meated the trial, the allegation is false and the government knows or should know it is false.

In attempting to support this argument, the government has chosen to distort and misstate the facts with respect to the discovery and use of the bank transcripts obtained near the end of the trial, and further chosen to attempt to mislead this Court into believing that the failure to obtain additional bank records during the trial was the result of what it incredibly characterizes as a "casual attitude displayed by defendants' counsel" regarding them (Gov. Br. p. 65). Continuing its argument based on inference, implication and innuendo, the government asserts without citing one shred of actual evidence, that "the evidence firmly suggests that the decision not to use the available bank records may have been a deliberate trial tactic." (Gov. Br. p. 67 fn.) Equally false and inexcusable is the implication that defense counsel cross-examined Glasser with bank documents in its possession and chose not to use them (Gov. Br. p. 66).

The facts are that the defendants received no documents until February 21, 1974, after the government rested and the decision not use bank transcripts which were in the possession of the defense was based solely on the fact that those records, standing alone, proved absolutely nothing about Glasser's testimony with respect to his inheritance, since the transcripts themselves were consistent with a contention that the money was transferred from older bank accounts and counsel believed that to be the fact. The defense did not use the transcripts then, not for fear that they would harm the defendants in any way as suggested by the government (Gov. Br. 67), but, rather, with the belief (without the benefit of hindsight) that they proved nothing.*

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* Moreover, there was no basis to request a continuance upon receipt of the transcripts—a request which undoubtedly would have been strenuously opposed by the government and denied by the court—since defense counsel could at that time make no offer of proof as to what further bank documentation would establish.

Both the assertions and the characterizations upon which they rest, as the government well knows, are contradicted both by sworn affidavits from defendants' counsel submitted to the Court below (A699a et seq.; 763a et seq.), by the trial court's outright rejection of the government's "trial tactic" argument (A799a) and by the conduct of the defense throughout this case which—as the government also well knows—has been anything but "casual".

The fact is that the government has deliberately chosen to avoid the fundamental issue of its own conduct of this prosecution by this shabby and transparent effort to shift the responsibility for Glasser's perjury onto the shoulders of defense counsel without whose efforts the perjury would never have been discovered in the first place. It is well to recall that it was the defendants, not the government, who requested discovery of Glasser's financial records prior to trial (although their motion was denied). It was the defendants, not the government, who subpoenaed Jack Glasser's tax returns and his other financial records. It was the defendants—over the government's objection—who demanded production of the original Glasser tax returns after Glasser conveniently claimed to have lost all but his 1972 return. It was the defendants, and not the government, who subpoenaed the bank records from the banks shown on the 1972 return and it was the defendants, not the government, who obtained the probate records regarding Betty Glasser's parents' estates, which were readily available in public files.

The government's indolence did not end with the trial; on the contrary, it continued long after it was over. By its own admission, even after the defendants did obtain further records from the East New York Savings Bank, the Greenwich Savings Bank and the Emigrant Savings Bank, records showing approximately $57,000 in *cash* deposits in Glasser's savings accounts, the government responded by interviewing the Glassers on several occasions

in May of 1974 and then accepting—without any further investigation—Glasser's "explanations" of the source of his wealth, despite the fact that the Glassers, during these May interviews, revealed certain information to the government for the first time regarding the sources of their wealth.

And, significantly, it should be noted that the government admits that during the pendency of the first new trial motion, it possessed relevant bank records which it deliberately chose not to reveal, either to the defendants or to the Court. However, unlike defendants' counsel, who has stated under oath that his failure to utilize bank records was based solely on a good faith belief that those records could not responsibly be used, the government admits that its decision to withhold this evidence from the Court and the defendants was quite conscious, but offers no reason whatsoever for this decision, except that it did not wish to make a "piece-meal production at that time". Why the government could not have requested an adjournment of the motion—in the same way that it seeks to fault defendants for not requesting a continuance—remains unclear.

In sum, it is submitted that the record does not support any contention of a lack of due diligence on the part of counsel.

* * *

With respect to the responses of the government concerning our arguments based upon *Brady* v. *Maryland*, 373 U.S. 83 (1963) (Main Br. pp. 43-47; Supplemental Br. pp. 7-12)—arguments in which due diligence or the lack thereof is irrelevant—we feel nothing need be added here and rely on the Briefs already submitted, except to note that the government apparently has chosen to ignore our argument concerning post-trial suppression and the distinction of *United States* v. *Rosner*, 516 F.2d 269 (2d Cir. 1975) contained therein. (Supp. Br. pp. 9-13).

POINT II

There Was No Evidence Of The Single Conspiracy Charged In Count 1 Of The Indictment; The Convictions On That Count Should Be Reversed and Separate Trials Ordered.

By passing off defendants' substantive analysis of the evidence in this case relevant to the conspiracy count as an attempt to "erect artificial divisions" (Gov. Br. p. 94), and resorting to illogical and unreasonable inferences concerning the size of the fur industry in New York, the government's response to our claim of variance concerning Count 1 is clearly insufficient.

It is not surprising that the government continues to rely on inapposite "chain conspiracy" narcotics cases which have nothing to do with the rather unique set of facts in the case at bar. There is simply no way for the government to explain Glasser's direct testimony that each of his transactions was "separate" (A65a) and that the two other witnesses for the government acted independently of each other and of Glasser. Nor can the government adequately state how the success of any one of the transactions testified to was dependent upon the other, as is required in order to sustain a single conspiracy charge.

For the government to ignore our argument of the prejudicial effect of the misjoinder by a simple statement that "defendants have failed to make any showing [of prejudice]" (Gov. Br. p. 97) ignores the arguments advanced on pages 58-61 of the Main Brief and further ignores the self-evident nature of the prejudice here. Defendant Stofsky was implicated in only three of the fourteen transactions proven at the trial and defendant Gold, in only seven (Main Br. p. 52). Since there was a misjoinder, these defendants, as well as the other two,

were entitled to separate trials at which evidence—both hearsay and non-hearsay—concerning the other transactions, not relevant to them, would have been inadmissible. Further, the fact that the government improperly was permitted to urge to the jury that the union leadership as a group was corrupt, unfairly enhanced the credibility of the government's testimony against each defendant; certainly, at separate trials, each defendant would not have to be saddled with explaining the conduct of his colleagues, about whom no such testimony would be admissible.

Therefore, the facts of this case, unlike those of *United States* v. *Miley*, 513 F.2d 1191 (2d Cir. 1975), where no such prejudice was shown, warrant reversal and retrial in separate trials.

POINT III

Defendants' Convictions For Tax Evasion Are Improper and Should Be Reversed.

In our Main Brief (Point IV), we argued that the convictions of defendants Stofsky and Gold for tax evasion should be reversed because, *inter alia*, there had been no conference given to defendants prior to the indictment, in violation of Internal Revenue Service Regulations, Section 601.107(b)(2), 26 C.F.R. § 601.107(b)(2), and because there was insufficient evidence to convict defendant Stofsky on Counts 25 and 26. The government fails to support its response with applicable law or testimony.

We argued that since IRS Regulation, Section 601.107(b)(2) required that defendants be afforded a conference before indictment and no such conference was given, the indictment must be dismissed because of the government's failure to follow its own regulations. See, *e.g.*, *United States ex rel. Accardi* v. *Shaughnessy*, 347

U.S. 260 (1954) and other cases cited at Main Brief, p. 70. The government's counter-argument is twofold: (1) The cases permit the government to avoid its own regulations and present evidence to the grand jury without first holding a conference; and (2) the regulation itself was not in effect at the time this indictment was voted. Neither of these arguments is valid.

As we stated in our Main Brief, p. 71, our attack is not directed at the power of the grand jury to indict, but, rather, at the power of the government to ignore its own promulgated regulations prior to presenting a case to a grand jury.

The government's argument regarding the amendment of Regulation, Section 601.107(b)(2) is insufficient. The publicly-available regulation, that published in 26 C.F.R. § 601.107(b)(2), was amended on April 12, 1973, after the grand jury had been presented evidence regarding the defendants' alleged tax evasion and after the first indictment, 73 Cr. 257, was filed on March 27, 1973. That the secret, internal-use Internal Revenue Manual was amended in December 1972 is irrelevant, as it is the officially promulgated Code of Federal Regulations which governs.* Cf. *Sullivan* v. *United States*, 348 U.S. 170 (1954).

We also argued in our Main Brief (Point IV (B)), that there was insufficient evidence to support the convictions of defendant Stofsky on Counts 25 and 26 since there was no evidence that there was a "partnership" for tax purposes between Stofsky and Gold. The

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* Nor is it relevant that the superseding indictment was filed on June 21, 1973; the government violated its regulation when it presented its evidence to the grand jury, an event which clearly took place before April 12, 1973. And it surely cannot be contended that the filing of a superseding indictment after April 12, 1973 relieved the government of the obligation which it had violated with respect to the March 27, 1973 indictment.

government argues that it was appropriate for the jury to draw the inference of such a "partnership" and, therefore, appropriate to allocate one-half of the monies alleged to have been received by Gold to Stofsky. We submit that there was insufficient evidence of tax evasion on the part of defendant Stofsky.

While Grossman did testify that both Stofsky and Gold were part of his payoff scheme, he only testified that he paid Gold; never did he suggest that Stofsky received or acknowledged recieving one cent of these monies. We submit that the jury could not properly infer from this testimony, which was, arguably, sufficient to support a conviction of Stofsky as an aider and abettor to the crime of bribery, that Stofsky and Gold were "partners" in such a sense as to make applicable those rules of law regarding allocation of income received by one member of a partnership. In fact, if anything, such a conclusion would be directly contrary to the jury's implicit finding of a single conspiracy.

It is therefore respectfully submitted that for all these reasons and those contained in the Main Brief, the convictions of defendants Stofsky and Gold on these counts must be reversed.

POINT IV

The Convictions For Obstruction Of Justice Must Be Reversed and The Count Dismissed.

In our Main Brief (Point V), we argued that the convictions for obstruction of justice were factually and legally insufficient and, in any event, that venue was not proper in the Southern District of New York. The government's response to this point is patently insufficient.

The government's contention (Gov. Br. p. 115) that defendants' argument is disposed of by *United States* v.

Cioffi, 493 F.2d 1111 (2d Cir.), *cert. denied*, 419 U.S. 917 (1974) is simply erroneous. *Cioffi* does little more than adopt the rule of *Cole* v. *United States*, 329 F.2d 437 (9th Cir.), *cert. denied*, 377 U.S. 954 (1964) in a factual situation far more similar to that of *Cole* than to the one at bar. In *Cole*, the defendant "demanded", "implored" and "insisted" that the witness assert his Fifth Amendment privilege, 329 F.2d at 442, and in *Cioffi*, this Court held that "the whole tenor of the various phases of the messages . . . was that [the witness] had better do what he was told, or else". 493 F.2d at 1118. Both of these factual situations are a far cry from the facts herein, where it was Glasser himself who came to the defendants, demanding that they provide him an attorney at their expense and requesting of them advice as to what he should do. There was no testimony that the defendants threatened Glasser or demanded, implored or insisted that he assert his Fifth Amendment privilege.

Additionally, the government, we submit, has dismally failed to support its contention that venue was proper in the Southern District of New York (Gov. Br. pp. 118-20). The reference to pre-April 4, 1972 events contained in the government's brief is totally irrelevant, as Count 24 of the Indictment clearly charges events which, Glasser testified, took place in Queens County on April 4, 1972. Also irrelevant is Glasser's telephone call to Stofsky in Manhattan and Stofsky's telephone call to Gold, as both of these occurred before any mention was made of getting Glasser an attorney or his asserting his Fifth Amendment privilege.

The point is that "the *endeavor*, whether successful or not, is the gist of the offense." *United States* v. *Cioffi*, *supra*, 493 F.2d at 1119. (emphasis added). It is clear, both from the indictment and Glasser's testimony at trial, that the alleged "endeavor" occurred, if at all, in Tiffie's Restaurant in Queens and nowhere else. Gold's telephone

call to Cammer and Hammer's appearance for Glasser occurred after the offense charged—the endeavor—had allegedly taken place. If Gold had not reached Cammer and if no attorney had appeared for Glasser, the "endeavor", as charged, would still legally have occurred, if the facts supported such a finding. *United States* v. *Swann*, 441 F.2d 1053 (D.C. Cir. 1971). The government cannot convert by *ipse dixit* a completed offense into a continuing one and, thereby, establish proper venue.

For these reasons, and those contained in the Main Brief, the convictions on this count must be reversed.

CONCLUSION

For all of the above reasons and the reasons contained in the Main and Supplemental Briefs, the convictions of defendants Stofsky and Gold should be reversed.

Respectfully submitted,

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